SOVEREIGNTY:

A Commencement Address

Before the Faculty, Graduates, and Students

OF THE

JEFFERSON SCHOOL OF LAW

At Louisville, Ky., May 31, 1922

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Westerfield-Bonte Co., Inc., Louisville, Ky.

Lampades Multae, Una Lux.

Constitutions are in politics what paper money is in commerce. They afford great facilities and conveniences. But we must not attribute to them that value which really belongs to what they represent. They are not power, but symbols of power, and will, in an emergency, prove altogether useless unless the power for which they stand be forthcoming.—Macaulay.

The brain that conceived this organization could not have been highly trained in the true spirit of American institutions. The organization and its purpose are repugnant to all the fundamental ideas upon which our government is based. The whole governmental structure is builded upon the rights and duties of the individual and any organization which contemplates the abdication by the individual of his sovereignty, and the granting or giving over to another by him of the exercise of his duties of citizenship necessarily strikes at the foundation of the whole structure, and can not be tolerated.—Judge Turner, in Burns v. Lackey, 171 Ky. 38.

Whatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combinations of skill and force, can do in his favor. In this partnership all men have equal rights, but not to equal things. * * * And as to the share of power, authority, and direction which each individual ought to have in the management of the State, that I must deny to be among the direct, original rights of man in civil society; for I have in my contemplation the civil, social man, and no other. It is a thing to be settled by convention.

If civil society be the offspring of convention, that convention must be its law. That convention must limit and modify all the descriptions of constitution which are formed under it. Every sort of legislative, judicial, or executory power, are its creatures. They can have no being in any other state of things; and how can any man claim, under the conventions of civil society, rights which do not so much as suppose its existence; rights which are absolutely repugnant to it?—Burke.

A State is the common weal of a people; but a people is not every assembly of men brought together in any way; it is an assembly of men, united together by the bonds of just laws, and by common interests.—Cicero.

SOVEREIGNTY

I.

Mr. Chairman, Ladies and Gentlemen:

At the outset, I hasten to assure this audience that I make no pretense of bringing to its attention anything novel or original touching the nature of the State or the basis of Sovereignty. Nor would I be so vain as to imagine that these subjects have not already received full and ample consideration at the hands of the students and instructors of the Jefferson School of Law. A complete exposition of the subject I have chosen for this address would require the labor of many minds and the study of a lifetime. Nevertheless, I have ventured to select the theory of sovereignty as a topic of discussion, first, because it is a topic which, by reason of its very elusiveness, has always proved fascinating to me; secondly, because the events of the past eight years have tended to revive interest in the theme and to give it a measurable degree of timeliness; and, lastly, because its treatment here and now may, perchance, serve as a sort of pretext for getting you to renew your inquiries and to overhaul your conclusions respecting a primary and fundamental postulate of all law.

To set before you what I wish to say as pointedly and as concisely as possible, the most natural and most obvious mode of procedure would seem to be to consider (1) what is meant by sovereignty, (2)

how it has originated, and (3) in whom, both actually and theoretically, sovereignty is lodged or vested. This order of treatment will be followed, not slavishly but substantially, and, incidental to the main theme, I shall ask you to consider whether the generally accepted American conception of sovereignty as something inherent in the citizen or in a majority of the citizens or, if you please, in the entire body of the citizens is a true or defensible conception.

Sovereignty, as I use the term, is, of course, a political or juristic conception. As such it cannot exist apart from the State or from some political entity analogous to the State. Even if we concede that the people who constitute a given State may be the seat and source and ultimate depositaries of sovereignty, yet as to them it can have no real substantive meaning unless or until they sustain to one another a definite social or political relation. If it were conceivable that a political organism, such as the State, might voluntarily disintegrate and resolve itself into its constituent (not to say, its *original*), elements, and thus bring about a condition where each and every citizen would be his own exclusive master, an all-sufficient law unto himself, and absolutely and entirely independent of all other of his fellow beings within the former bounds of the State so dissolved, it is difficult to see how sovereignty, in the commonly accepted sense, could be predicated of any single individual in that anomalous condition. Self-mastery, self-control, self-command, however

desirable, necessary, or commendable, are obviously not enough to constitute political sovereignty. A solitary castaway on a desert island might say, in the language of Selkirk:

> I am *monarch* of all I survey,
> My rights there are none to dispute;
> From the centre all round to the sea,
> I am *lord* of the fowl and the brute;

yet, in no true sense, could he claim to possess or exercise the powers or functions of political sovereignty. In the very nature of things and by force of the word itself, sovereignty signifies the dominion of, at least, one person over, at least, one other person, in virtue of some social or political relation pre-existing between them. If, instead of dominion, there be mutual restraint or mutual forbearance or a reciprocal arrangement of "give and take," then the agreement or compact providing for such a partial surrender of personal freedom becomes to that extent a type and an emblem of sovereignty, and the irresponsibility identified with personal isolation ceases.

This may sound like an empty metaphysical abstraction, but the thought will be worth considering, when we come to scrutinize certain political catchwords or phrases or maxims which have long done service in written constitutions and in our current legal nomenclature.

The origin of sovereignty is coeval with the origin of the State or of the political organism out of which

the State has developed. "Law is at once the source and the expression of sovereignty. Law creates the state and the state creates law by a common and mutual impulse; the two are born at an instant, are inseparable through life, and must die together." "Somewhere in any political society must be found a ruling power, be it the folk, the oligarchy, or the king; and in that power the law-making function inheres. There is no law, then, without a sovereign; and the fundamental inquiry in any study of the application of law must be, what sovereign created the law in question." It is a foundation stone in the teaching of elementary law that "a *State* is a political society, exercising supreme dominion over all persons and property within the territory which it occupies and over which its jurisdiction extends." "Sovereignty," as the Supreme Court puts it, "is the supreme power by which any State is governed." Less accurately, as it seems to me, the same Court has also said:

> "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."

It is the State, nevertheless, rather than the people as the authors and founders of the State, which is, at one and the same time, both political and supreme. "This political supremacy of the State con-

stitutes its *sovereignty,* and is its one essential attribute."

Stated in another form, it may be said that "The State is the embodiment and personification of the power of the people. And this 'power of the people,' in its highest dignity and greatest force, is sovereignty." "Sovereignty is the essence of power, from which flow emanations of power." It is "the concentrated fullness of political power or of the power of the State." Normally it is the *coercive* power of the State. But, mark you, this is not to say that such "sovereignty" means *absolute,* much less perpetual, power. The character of sovereignty, abstractly considered, depends upon the power resident in the people or the power actually vested in the State by the people, as its creators. Absolute, omnipotent power cannot be claimed for the people any more than it can be claimed for the Crown or the State; whence springs the true maxim that "resistance to tyrants is obedience to God." If with men politically unorganized, the majority overpower and rule the minority, or the stronger subdue the weaker, it is only in virtue of their superior force and not because of any superior right inherent in a majority or the overmastering *vis major.*

"Sovereignty is not the sum of separate special rights, but the political aggregate right"; it is, so to speak, a new right, arising out of the association of men, in a political mode and for political purposes, which does not exist apart from such association but

is begotten by it. In past ages, before the day of the "Utilitarians" and the so-called "analytical jurists," like Austin and Bentham, it was customary to seek a foundation for sovereignty in some antecedent right to rule, such as a divine commission, which existed independently of any act of human volition; but the great change which they wrought in the theory of government consisted in the assertion that "sovereignty is not a question of right, but of fact;" that the sovereign is not the person entitled to rule, by birthright or right divine, but who does, in fact, at any given time or place, received the obedience accorded to a sovereign. Sovereignty, therefore, depends upon the existence of the State. "The State, as a person, is sovereign." Hence, it is both natural and inevitable that we should associate the idea of sovereignty with the State, and that we should constantly speak of "the sovereignty of the State." Furthermore, it cannot be too often repeated that "Sovereignty does not exist before the State, nor outside the State, nor above the State; it is the power and majesty of the State itself; it is the right of the whole."

To speak, as is so often done, of the "sovereignty of the people" is inaccurate and misleading, unless by "the people" is meant "not a loose multitude of individuals, but the politically organized whole." By "the people" some persons would seem to intend "simply the sum total of the individuals who find themselves brought together in the State," that is

"the State resolved into its hypothetical elements," and such philosophers attribute "the highest power to the inorganic mass, or (at least) to the majority of the individuals composing that mass." But this radical and extreme conception is not compatible with the constitution of any State, not even with that of an absolute democracy, for even in an absolute democracy it is (historically) the regular assembly of the people, acting, as a rule, by majority, and not the isolated, detached, and "atomized" multitude that exercises the State or aggregate power. "Government," as Edmund Burke expressed it, "is not made in virtue of natural rights, which may and do exist in total independence of it. * * * Government is a contrivance of human wisdom to provide for human wants. * * * Society is, indeed, a contract (and) each contract of each particular State is but a clause in the great primeval contract of eternal society."

The origin of the State, and of "sovereignty" as a necessary and inseparable attribute of the State, has been sought by men in contract, in custom, in conquest, and as a divine endowment. The theory of a "social contract" superimposed upon a primitive "state of nature" or emanating from men who chance to meet in that crude state, which was advanced by Hobbes, Locke, Rousseau, and others, has never risen above the plane of a mere speculative theory. It is completely negatived by all that we know of the history of the human race and of the

progress of political institutions. Hegel, in his "Philosophy of History," says:

> "If, therefore, freedom is asserted to consist in the individuals of a State all agreeing in its arrangements, it is evident that only the subjective aspect is regarded. The natural inference from this principle is that no law can be valid without the approval of all. This difficulty is attempted to be obviated by the decision that the minority must yield to the majority; the majority therefore bear the sway. But long ago Rousseau remarked that, in that case, there would be no longer freedom, for the will of the *minority* would cease to be respected. At the Polish Diet each single member had to give his consent before any political step could be taken; and this kind of freedom it was that ruined the State."

The germ of the State must be found in the moral nature of man as a "social being," as a "political animal," to use the time-honored phrase of Aristotle. "The moral sense, or conscience," said Jefferson, "is as much a part of man as his leg or arm; as a wise Creator must have seen to be necessary in an animal destined to live in society." To this he added: "I am convinced man has no natural right in opposition to his social duties."

Passing through the natural and successive gradations of the family, the family group or "house," the clan, and the tribe, to the combination or consolidation of related tribes, Sir Henry Maine, in his illuminating treatise on "Ancient Law," declares that "The history of political ideas begins, in fact, with the assumption that kinship in blood is the sole pos-

sible ground of community in political functions," and reinforces his thesis with the statement that archaic society "was not a collection of individuals, but an aggregation of families." The primacy of the father, the elder brother, the patriarch, or the tribal chief, foreshadowed and prefigured the sovereignty of the perfected State, as we now know it, but it was, at best, but the germ of sovereignty. This suggestion of the learned jurist, however, is skilfully combatted by Walter Bagehot, in his masterpiece on "Physics and Politics." Bagehot, in effect, carries us back to the "Stone Age," and deals with mankind in an aboriginal state of isolation and formless cohesion or casual collision, as the case might be. He starts with the proposition that "Man, being the strongest of all animals, differs from the rest; he was obliged to be his own domesticator; *he had to tame himself.*" Xenophon seems to have had an inkling of the same idea when he said that man is the "hardest of all animals to govern." Individual self-government, however, could hardly have been attained in a state of complete and lonely isolation. The conquest of self, the gradual curbing of animal passion, the regulation of the will, could only come from the action and reaction upon one another of many members of the human family, drawn together in groups or clusters by an intuitive sympathy, philanthropy, or impulse of self-preservation, or by other instincts native to the race. Self-government, born of a sort of social attrition, is the primordial germ of organized society

and of civil and political order. There could be no settled or lasting peace in any community without it. Hence, as an inevitable corollary, it follows that the right of *local* self-government, of home rule, is a primal, generic, and ineffaceable right, without which no genuinely free government can exist, and without which all other civil rights, whatever their nature, scope or magnitude, must constantly be in peril of loss or destruction, or tend to shrink into comparative insignificance.

It may be admitted, at any rate, that man from the very beginning was a "social creature," dominated at the outset by social instincts. Yet these must have operated, at first, within a very limited range. He is to be called, by nature, a "political animal," only insofar as the strictly "political" phenomena of his development may be regarded as the symptoms or manifestations of his "social nature." Both Maine and Bagehot agree, however, that "old law (as it has come down to us) rests, not on contract but on *status.*" Habit, custom, usage, tradition were all-powerful, first, in determining social relations, and, later, in determining religious and political relations. The advance of man politically has been achieved by emancipating himself from the yoke of custom; and by the growing substitution of contractual relations for those of mere status. "The great difficulty which history records," says Bagehot, "is not that of the first step, but that of the second step. What is most evident is not the

difficulty of getting a fixed law, but getting out of a fixed law; not of cementing a cake of custom, but of breaking the cake of custom; not of making the first preservative habit, but of breaking through it, and reaching something better.'' Continuing, he observes:

> ''It is connected with this fixity that jurists tell us that the title 'contract' is hardly to be discovered in the oldest law. In modern days, in civilized days, men's choice determines nearly all they do. But in early times that choice determined scarcely anything. The guiding rule was the law of status. Everybody was born to a place in the community; in that place he had to stay; in that place he found certain duties which he had to fulfill, and which were all he needed to think of. The net of custom caught men in distinct spots, and kept each where he stood.''

This distinguished author, moreover, has well said that ''The change from the age of status to the age of *choice* (*i. e.,* contract or convention) was first made in States where the government was to a great and a growing extent a government by discussion, and where the subjects of that discussion were in some degree abstract or, as we should say, matters of principle. * * * A free state—a state of liberty—means a State, in which the sovereign power is divided between many persons and in which there is discussion among those persons.'' In much the same spirit, some one has remarked that the nimble-minded Greeks were intolerant of constituted or stereotyped authority and respected no authority but that of ar-

gument; and, in quite recent times, democracy has been happily defined as meaning government by discussion.

Coming to our own day, the theories of both Hobbes and Filmer, Rousseau, and Sir Henry Maine, the champions respectively of the "divine right," "social contract," and "customary status" dogmas, have been pronounced erroneous, if not inadequate, to explain the origin of the State, and of sovereignty as the distinguishing feature of that institution. Edward Jenks, an English scholar of the highest standing, has, in his "History of Politics," affirmed that "No fact has been more firmly established by modern historical researches than the origin of the State in conquest"; and we are assured that this is not a hypothesis but a conclusion resting upon the inquiries of innumerable scholars, especially English and French. This conclusion has been reached by tracing the development of the State back into the earliest period of which we have written records. The State emerged as the result of fusion through conquest of countless minor unities. Bagehot himself was aware of this truth, for, as he puts it, nations are founded in conquest because "the beginning of civilization is a military advantage;" and our own John Fiske has well described the diverse methods of nation-making in these words: "The Oriental method is conquest without incorporation; the Roman, conquest with incorporation, but without representation; the English, conquest by incorporation with representation."

To us, therefore, the imaginary "state of nature," to which, in their philosophizings, Hobbes, in his *Leviathan,* and Rousseau, in his *Contrat Social,* harked back, seems visionary and fantastic, and the more modern and more acceptable view would seem to be, to use the words of a recent writer, that "the starting-point for the evolution of democracy is the origin of the State, for the roots of the present lie deep in the past, and the origin of the State is to be found in conquest and military rule." And, on this subject generally, much of what I am attempting to say will be found more copiously and more learnedly expounded in the first three chapters of Volume I of Tucker's excellent treatise on "The Constitution of the United States."

II.

With this preliminary glance at the rudiments of the subject, we pass to a consideration of the question, To whom does sovereignty belong? I have already ventured the opinion that it does not belong to anybody outside of or apart from the State. But I well know that this view does not generally obtain, and, perhaps, the reason why it does not generally obtain is because we have been confused and blinded not only by the course of recent events but by the trend of political discussion throughout the history of our conversion and growth into a State and a Nation. In our study of the subject we seem to have

lost sight of the fact that the United States "sprang from a nation in which the State-making process had been going on for many hundred years," and to have erroneously supposed that we ourselves had originated or created much that we had, in fact, inherited. The formulas in which many, if not most, of our cherished political beliefs have been expressed, were not our own but were adopted bodily from another and more ancient source. Or, to put the thought, if I may, in borrowed language: "No doubt valuable additions have been made to the original structures, but it will be remembered that in every case democracy has been at work on original materials created by other hands."

What I shall further say, in attempting to answer the question propounded, To whom does sovereignty belong? is not meant as a criticism of inherited conceptions of the State or of sovereignty in the State, so much as a possible contribution toward more exact and, if I may say it without being guilty of presumption, toward more rational and consistent views of the subject. It has been said by a recent writer in the same field that "Men are still as enslaved to dead ideas as when the barbarians followed the ghost of departed Rome," and it may be that some of us have not yet entirely escaped from this bondage.

Be assured that I hold in becoming reverence the names and teachings of men like Aristotle and Cicero, among the ancients, as I do the names and teachings of men line Milton, Locke, Rousseau, Burke, Mack-

intosh, Paine, and Jefferson, among the sages of more recent times. But we need not go so far back to get a correct idea of how the prepossession, to which I allude, has worked in the minds of constitution-makers and law-givers.

The present Constitution of Kentucky, in that part of it commonly called the "Bill of Rights," declares:

> "All men are, by nature, free and equal;"
> "All men, when they form a social compact, are equal;"
> "All power is inherent in the people, and all free governments are founded on their authority."

Whatever else may be said of these deliverances, all, I imagine, will agree that they are unmistakable echoes of the "social compact" theory of government, as appropriated and promulgated by Thomas Jefferson, in whose honor your school has been named, and by George Mason and certain of his equally celebrated contemporaries.

It is one thing, however, to say that government is founded in contract and quite another thing to affirm that, at and before the formation of such contract, the parties thereto are, *by nature,* "free" and "equal," and that "all power is inherent" in them, and that all free governments are founded "on their authority" and with their consent. By such expressions, I take it, it is intended to convey the idea that the powers and prerogatives of government, includ-

ing its sovereignty, are derivative from men in their natural state.

But even the poet's lines give a better clue to political derivations than is discoverable in these conventional stock phrases of our time.

"Freedom is growth and not creation;
One man suffers, one man is free;
One brain forges a constitution;
But how shall the million souls be won?
Freedom is more than a resolution—
He is not free who is free alone."

This flash of political insight from John Boyle O'Reilly is not very unlike Cicero's more statesmanlike utterance: "Our State," wrote the noble Roman, "did not spring from the brain of one man, but of many; nor was it matured in a lifetime, but in the course of generations and centuries."

The persistence of the idea that the natural man by himself alone is in some sort a sovereign is illustrated by the utterances of some of our own most eminent jurists. Thus, in the early case of Davis v. Ballard, 1 J. J. Marshall, 563-582, decided June 17, 1829, Judge Joseph R. Underwood, for the Court of Appeals, said:

> "We acknowledge no *supreme* power, except that of the people. * * * Our constitution is the supreme law, prescribed by the *supreme* power."

He further declared that the three separate and distinct bodies of magistracy, to wit, the legislative,

the executive, and the judicial, established by the constitution, taken all together, "represent the great body of the people, from whom their powers are derived, and in whom *all* power ultimately rests."

In the later case of Gaines v. Buford, 1 Dana, 481-513, decided November 4, 1833, wherein separate opinions were delivered by Judges Underwood and Nicholas, Judge Underwood expressed himself somewhat more conservatively as follows:

> "I shall notice one idea more in defense of the act (*i. e.,* the Occupying Claimant's Act of 1824), and only one. It is the appeal made in the preamble to the *sovereign power of the State.* I do not admit that there is any *sovereign power,* in the literal meaning of the terms, to be found anywhere in our systems of government. The people possess, as it regards their governments, a *revolutionary sovereign power;* but so long as the governments remain which they have instituted, to establish justice and 'to secure the enjoyment of the right of life, liberty, and property, and of pursuing happiness,' *sovereign power,* or, which I take to be the same thing, *power without limitation,* is nowhere to be found in any branch or department of the government, either State or National; nor, indeed, in all of them put together. * * * The tenth article of our State Constitution, consisting of twenty-eight sections, is made up of restrictions and prohibitions upon legislative and judicial power, and concludes with the emphatic declaration, 'that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void.' These numerous limitations and restric-

tions prove that the idea of *sovereignty in government* was not tolerated by the wise founders of our systems. *'Sovereign State'* are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. I firmly believe that the idea of sovereign power in the government of a republic is incompatible with the existence and permanent foundation of civil liberty, and the rights of property. The history of man, in all ages, has shown the necessity of the strongest checks upon power, whether it be exercised by one, a few, or many. Our revolution broke up the foundations of sovereignty in government; and our written constitutions have carefully guarded against the baneful influence of such an idea henceforth and forever. I cannot, therefore, recognize the appeal to the sovereignty of the State, as a justification of the act in question."

This is a thoughtful and a weighty utterance, but it is worthy of notice, in passing, that Judge Nicholas, in his separate opinion in the same case, while concurring in the final conclusion reached by his associate on the bench, does not go into the subject of sovereignty, but contents himself with these more guarded words:

> "That doctrine would carry us a great way. How far it would carry us it is impossible at once to foresee. The mind cannot, at a single effort, cast itself over the whole circumference of its extension. It is not sufficiently clear to my mind that it will not go far enough to cripple and curtail powers that are essential and indispensable to all governments."

The sentiments voiced by Judge Underwood may have been provoked by the Nullification controversy between President Andrew Jackson and the State of South Carolina, then fresh in the public mind, concerning which certain condemnatory resolutions had been adopted by the Legislature of Kentucky and which were approved on the 2d of February, 1833. The long and interesting preamble to these resolutions, among other things, argues that, "Government is the result of a convention between individuals, deriving its just powers from the consent of the governed. There are no original sovereigns —save each individual man in a state of nature, and his sovereignty extends only to himself. All government is a trust, springing out of the necessities of mankind."

In an Introductory Lecture to the Law Class of Transylvania University, at Lexington, delivered by Judge George Robertson on November 7, 1835, he adverted to the same subject, using these words:

> "God and the people are the only actual sovereigns, according to the American creed."

This lecture was mainly devoted to a discussion of the much-debated question of State Sovereignty as opposed to National Sovereignty, and, in reference to this supposed irrepressible conflict, Judge Robertson said:

> "So far as the general government has power, it is sovereign, and is, until its powers are re-

voked, the only sovereign to the extent of its exclusive authority. And, to this extent, the individual States cannot be sovereign, because, so far, they have no constitutional power. Each State is, however, in one sense, a sovereign—it is sovereign to the extent of its local power, and exclusively local interests. *Sovereignty being the highest power in a State,* the general government must be the only sovereign within its prescribed sphere, and each State in the Union must be the only sovereign within the scope of *its residuary power.* We speak, of course, of political sovereignty. God and the people are the only actual sovereigns according to the American creed. If the individual States possess as extensive and unqualified sovereignty or political power as they did before the adoption of the Federal Constitution, there is no general government—for there can be no government without inherent power to govern; and, consequently, if the people of the States are also citizens of the United States, and have a general government, they must have made that government by imparting to it powers which must necessarily have been subducted from the original powers of the local governments."

The doctrines of the Kentucky and Virginia Resolutions of 1798-'99 were supposed to have been exploded or themselves "nullified" and rendered innocuous by the events of 1832-33, when the National Government seemed about to come into armed collision with the recalcitrant and obstreperous State of South Carolina, over the enforcement of the tariff laws; but twenty years later the Resolutions of '98 and their implicit doctrine of "Nullification" were revived by the extraordinary action of one of

the two great national parties. In the year 1852, in the Democratic National Convention held at Baltimore for the purpose of nominating a candidate for the Presidency, the doctrines of the Virginia and Kentucky Resolutions were formally avowed as a rule of Democratic political faith; and, at Cincinnati, in 1856, the same political views were adopted by the Democratic National Convention of that year. This appears from the sentiments embodied in a resolution promulgated by both of these national conventions in the following words:

> "*Resolved,* That the Democratic party will faithfully abide by and uphold the principles laid down in the Kentucky and Virginia resolutions of 1798, and in the report of Mr. Madison to the Virginia Legislature in 1799; that it adopts those principles as constituting one of the main foundations of its political creed, and is resolved to carry them out in their obvious meaning and import."

The unsoundness of these views was ably demonstrated by Judge Robertson in a lecture to the Law Class of Transylvania University, delivered November 4, 1852, and again, in 1860, in an admirable essay by Hon. John B. Dillon, of Indiana, entitled "An Inquiry into the Nature and Uses of Political Sovereignty."

After reviewing the subject at length, Judge Robertson concluded his lecture with these remarks:

> "We thus see that, in adopting the Constitution of the United States, the people of each

State surrendered the essential attributes of sovereignty, and, by delegating them to their common and only national government, deposited them on the altar of Union. And we may rest assured that no less a sacrifice of local power and pride could have assured the great objects of every patriot—national independence, liberty and peace.

"We can not fail, also, to see that the asserted sovereignty of the individual States is altogether irreconcilable with the provisions of the Constitution of all the people of all the States, and would, if acknowledged, or usurped, lead to anarchy, confusion and civil war; to prevent all of which calamities, the wisdom of our fathers adopted the Constitution and established the government of the United States. And, as an inevitable consequence, we must all see that secession and nullification are revolutionary, and not constitutional, remedies for any local or personal grievance, whether imaginary or actual."

This may all seem plain and simple and indisputable to us now, and to require no labored demonstration, but by the Southern people of ante-bellum days, it was far from being universally admitted, and, in the end, owed its practical establishment not so much to abstract reasoning as to the logic of events.

In his first message to Congress, of July 4, 1861, the overstrained doctrine of "State Sovereignty" or "State Rights," as it was sometimes called, was vigorously combatted by President Lincoln, who used this language:

"This sophism derives much, perhaps the whole, of its currency from the assumption that there is some omnipotent and sacred supremacy pertaining to a State—to each State of our Federal Union. Our States have neither more nor less power than that reserved to them in the Union by the Constitution—no one of them ever having been a State out of the Union. * * * Having never been States either in substance or in name outside of the Union, whence this magical omnipotence of 'State Rights,' asserting a claim of power to lawfully destroy the Union itself? Much is said about the 'sovereignty' of the States; but the word even is not in the National Constitution, nor, as is believed, in any of the State constitutions.

"What is 'sovereignty' in the political sense of the term? Would it be far wrong to define it 'a political community without a political superior'? Tested by this, no one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union; by which act she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be for her the supreme law of the land. * * * Unquestionably the States have the powers and rights reserved to them in and by the National Constitution; but among these surely are not included all conceivable powers, however mischievous or destructive, but, at most, such only as were known in the world at the time as governmental powers; and certainly a power to destroy the government itself had never been known as a governmental, as a merely administrative power. This relative matter of national power and State rights, as a principle, is no other than the principle of generality and locality. Whatever concerns the

> whole should be confided to the whole—to the general government, while whatever concerns only the State should be left exclusively to the State. That is all there is of original principle about it. Whether the National Constitution in defining boundaries between the two has applied the principle with exact accuracy is not to be questioned. We are all bound by that defining, without question."

Great as is their interest, it may be fairly doubted whether this condensed narrative of the genesis of the Republic or the accompanying demarcation of the boundary line between State and National sovereignty can withstand the test of historical criticism. But the unique definition of political sovereignty is, in truth, not "far wrong."

It is not the object of this address, however, to point out the boundaries between State Sovereignty and National Sovereignty. To this audience that would be a work of supererogation. I merely touch upon that to indicate how vitally important the doctrine of sovereignty has been in our history as a people, and how important it is even today that we grasp and hold fast, if possible, clear and correct conceptions of the meaning of sovereignty in a free State.

Historically, I submit it is not true that political institutions among men originated out of contract or "common consent," albeit that conception is, in the present age of the world, a valuable working hypothesis, and, for practical purposes, approximates

accuracy and will suffice. Hegel well says: "The history of mankind does not begin with a *conscious* aim of any kind." I take leave also to deny that "all men are, by nature," politically free or politically equal. Political equality is attained only after what a great German jurist has called the "Battle for Right" or the "Struggle for Law." I further take leave to question the broad assertion that "*All* power is inherent in the people," though I freely admit that "all *free* governments are founded on their authority" and that "governments derive their *just* powers from the consent of the governed," with due emphasis on the words, "free" and "just."

I reaffirm that sovereignty, in a political sense, has no existence, other than a purely potential existence, apart from organized government; and that it comes into being in the very act of creating and constituting a government, and is an attribute of the government, and not of the individuals who compose it or happen to live under it.

In February, 1848, when, in France, the constitutional monarchy under Louis Phillipe, the "Citizen King," was abolished and the second republic proclaimed, an official manifesto, drawn up by Lamartine, as Minister for Foreign Affairs of the provisional government, declared: "Every Frenchman who has reached the age of manhood is a citizen of the State, and every citizen is a voter. *Every voter is a sovereign.* The law is equal, and is absolute for

all. No citizen can say to another: You are sovereign to a greater extent than I."

The assertion that "every voter is a sovereign," notwithstanding its prevalence in popular speech, is an extravagance that fails to command our assent. As a figure of speech intended to describe the administrative political function which each enfranchised citizen exercises in wielding the ballot it may do no harm, but it can hardly be true, even in the most limited and restricted sense, that "every voter is a sovereign."

III.

I realize that the strictures I have proposed with respect to terms widely current in popular political phraseology are not new. In the Kentucky Constitutional Convention of 1890-'91 substantially the same objections were raised by Governor Knott, who sat in that convention as the delegate from Marion. His somewhat "advanced views" were strenuously assailed by the Honorable Robert Rodes, of Bowling Green, delegate for the county of Warren and Chairman of the committee on the "Bill of Rights." He was one of the ablest members of that convention and his son, Mr. H. C. Rodes, of Louisville, has done for his distinguished father what ought long since have been done for many of his father's associates. He has extracted from the voluminous debates the principal speeches of Robert Rodes in connection

with the framing of the Bill of Rights and published them in book form. There are men in this audience, students of this law school, members of this graduating class, who, in all likelihood, may some day be called upon to revise or rewrite the Constitution of Kentucky. When that time comes those who aspire to leadership in the new generation can acquire no better equipment for their arduous task than that which is to be obtained by a careful and thorough study of the debates in the Constitutional Conventions of 1849 and 1890. If, when you approach the undertaking, the huge size of the ponderous volumes, in which those debates are recorded, appal you, let me suggest that you get hold, if you can, of the handy and unpretentious little book which contains the "Speeches of Robert Rodes," and I confidently predict that the taste excited by the reading of that compilation will almost certainly reconcile you to the drudgery of poring over the pages of the official and unabridged reports of the Constitutional Debates.

The political theory known as Socialism is, in my opinion, the most anti-social system that could possibly be devised. Under it the citizen is completely subordinated to the State. The State is everything, man is nothing. Communism, on the other hand, is simply democracy gone mad; it is little better than "slavery organized." Cicero seems to have had this insane delusion in mind when he said: "Excess of liberty, both with nations and individuals, eventu-

ates in an excess of servitude," and Edmund Burke, with his accustomed sagacity and vividness of expression, has laid it down for a truism that "men can not enjoy the rights of an uncivil and of a civil state together."

In the Soviet scheme of government, which has cursed the people of Russia during the past five years, the capital error is in maintaining that the *Menshiviki*, the few, have no rights which the *Bolsheviki*, the many, are bound to respect; that absolute, unlimited, and uncontrollable power over the whole people is vested in the majority, and that the State, though a necessary evil in the present state of the world, must eventually be abolished, when capitalism is crushed, when the so-called "social revolution" is accomplished, and when all classes of society are reduced to a common Proletarian level. Bolshevism or Sovietism (as we understand it), is an attempt to revert to a supposed "state of nature" that never had any real existence in fact and as an artificial condition is wholly unbearable. But this pernicious doctrine, the natural, not to say legitimate, offspring of the Hegelian teaching that the State is "all in all," and of the idolatrous "State-worship," which, until the Great War, was taught by Bernhardi and other members of the Prussian military caste and was assiduously propagated and inculcated throughout the German Empire as the divinely ordained gospel of universal political salvation, is not confined to protagonists of the Slavonic race. Here in America we

have had our Apostles of error, who would recoil, with inexpressible horror, at the bare imputation that they had ever so much as heard the sinister name of Karl Marx.

No less a person than James Buchanan, then President of the United States, in a message to Congress, on February 2, 1858, urging the admission of Kansas into the Union under what was known as the Lecompton Constitution, used these astounding words:

> "The will of the majority is supreme and irresistible when expressed in an orderly and lawful manner. They can make and unmake constitutions at pleasure. It would be absurd to say that they can impose fetters upon their own power which they can not afterwards remove. If they could do this, they might tie their own hands for a hundred as well as for ten years. These are fundamental principles of American freedom, and are recognized, I believe, in some form or other by every State Constitution."

And, within the past year, on the floor of the Senate of the United States, a grave and dignified Senator solemnly averred, in reference to a pending measure:

> "Another objection is that it infringes the personal liberties and rights of the individual. Mr. President, there is no such thing as personal liberty in a republic. No man in a republic has any right to do what the duly constituted majority has declared shall not be done."

In the first case it fell to the lot of a Kentuckian, Judge Samuel Smith Nicholas, and in the later case to the lot of another Kentuckian, Senator A. O. Stanley, in his recent address on "The Perils of Paternalism," to expose and denounce with masterly skill and conclusive logic this iniquitous political heresy.

If you have not already done so, let me beg you to read and ponder those wonderfully able essays of Judge Nicholas on the "Powers of a State Convention," on the "Power of Majorities over Constitutions," on "The Higher Law" and the "Law of War" and kindred subjects, which were first collected and published in book form in the year 1863, in the midst of the War Between the States. It is to Judge Nicholas that we are chiefly indebted for the incorporation into our Constitution of that precious provision, which first gained a place among the written guaranties of our fundamental law, in the Constitutional Convention of 1849-'50:

> "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Some objection was made to the retention of this provision in our present Bill of Rights because it was contended that these words state a self-evident truth, which needed no formal constitutional sanction to support it. But, in these pregnant and potent words, we find the "be all and the end all" of true political sovereignty. Some sort of theory of

sovereignty is the corner-stone of every form of government devised by man, and the supremacy of all law is conditioned on sovereignty somewhere; yet, for us, sovereignty itself is imbedded in the cardinal principle enunciated in the sentence I have just quoted, with its "thus far shalt thou go, but no farther." This principle is fundamental, infallible and indefeasible, because it is founded in truth and justice.

In his powerful essay on "The Law of War," first published in February, 1852, Judge Nicholas uttered these sublime words:

> "Arbitrary, despotic measures can never be politic measures to use against Americans for bringing them under obedience to the law, especially if those measures are tainted with illegality or usurpation. The exercise of usurped despotic power over an enlightened American agonizes every fibre of his moral sensorium. There is nothing he holds in greater abhorrence. The celebrated Edmund Burke, in his memorable denunciation of arbitrary power, declared that the people themselves could not, even by their own voluntary compact, be rightfully subjected to arbitrary power—that such a compact would be void. The people of Kentucky fully adopted this sentiment, and gave it a sort of consecration by placing it in their constitution."

Much misconception has arisen from certain expressions used by Thomas Jefferson respecting the rights of a majority. In his First Inaugural, of March 4, 1801, he said:

> "Absolute acquiescence in the decisions of the majority—the vital principle of republics, from which is no appeal but to force, the vital principle and immediate parent of despotism, I deem (one of the) essential principles of our government and, consequently, (one) which ought to shape its administration."

To this broad statement he was careful to annex the following qualification:

> "Bear in mind this sacred principle that, though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression."

But, on other occasions, he was not uniformly careful to explain his meaning, and it is at least doubtful whether the qualification given above is worded with sufficient care. Furthermore, I think we may fairly question whether the great statesman was careful always to distinguish between acts of the majority, unrestrained by constitutional barriers, and acts of the majority, under an organized and limited government, where their power and functions are strictly defined and circumscribed, and where they exert their power in an administrative capacity. In the former case, the rule of the majority cannot be justified; in the latter, it is a necessary rule for the practical administration of the government and for the orderly and effective transaction of business. The temporary majority is not the government, much less

is it the State or supreme sovereignty. It is merely, for the time being, "the governing power." The minority of today may be the majority of tomorrow, and *vice versa.* Of course, decisions of the majority, taken in a lawful manner and on questions within the legal competency of such majority, must be accepted, acquiesced in, and obeyed, until revised or repealed.

In all that I have said there has been no thought or suggestion of disrespect for constituted authority, and I would not have you for an instant think that I mean to impeach the true sovereignty of the State or the imperious and unchallenged supremacy of the Constitution and the laws. Nor do I mean to detract in any degree from the deference due the people or the honor which should be paid to every free-born American citizen in his own right, or to minimize the watchful jealousy with which his dear-bought rights, both constitutional and reserved, should be guarded. I believe, with all my heart, in "government of the people, by the people, for the people." It is only with the precise definition and the impassable limitations of sovereignty that I am here concerned.

Sovereignty is the necessary concomitant of government, and law is the authoritative expression of the sovereign will. Beyond this you need not be told that morality is the basis of all government, of all rightful political authority, and that back of every legal obligation will be found a corresponding moral obligation. Not only are private persons powerless

to impair their contracts, but, under our system, government itself is likewise forbidden to impair the obligation of contracts. To treat the "social compact," which we call a Constitution, or a covenant or league between States, which we call a Treaty, as a "mere scrap of paper," is moral treason to ourselves and to our country; it is a gross impiety, a hideous sacrilege, an unspeakable profanation. No hypotheses of government based upon a theoretical "state of nature," or upon the teachings of evolution, or upon the historical evidences of man's political beginnings in the twilight dawn of his career, or upon the so-called "social compact," can alter or undo the fact that "the powers that be are ordained of God"; and this truth is recognized and acknowledged in the preamble of our present State Constitution, which expresses gratitude "to Almighty God for the civil, political, and religious liberties we enjoy." Political outlaws no less than ecclesiastical apostates should be warned that "whosoever resisteth the power, resisteth the ordinance of God," for, as Alexander Hamilton once dramatically declared, "The sacred rights of man are not to be rummaged for among old parchments or musty records. They are written as with the sunbeam in the whole volume of human nature by the hand of divinity itself and can never be erased by mortal power."

IV.

By the oath of office you will each take, upon your admission to the Bar, you will solemnly swear "that you will support the Constitution of the United States, and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky, so long as you continue a citizen thereof; and that you will faithfully execute, to the best of your ability, the office of an attorney-at-law, according to law." (Cons., Sec. 228.) Ever afterwards (to use the words of Henry Clay) you can proudly claim: "I owe allegiance to two sovereignties, and only two; one is the sovereignty of this Union, and the other is the sovereignty of the State of Kentucky." As citizens of a great Republic, as sons of a mighty Commonwealth, as loyal votaries of that imperial Mistress, the Law, may you never forget the faith you will have plighted in the official oath you are soon to take. As you are true to that faith, so will you be true to yourselves, to your fellow-men, to your country, and to your God.

Availing myself of the privilege which attaches to a senior in the profession, may I not take the liberty to entreat you, and each of you, both in your private and your professional capacity, to exalt the Commonwealth, at all times and upon all occasions; to stand firm for its inviolable autonomy, for its dignity, its supremacy, and its majesty. Let no one, with your consent, scorn or contemn or belittle its

sovereign authority, or trample under foot its lawful mandates. Treat an insult or an injury to the Commonwealth as a personal injury or insult to yourselves. Remember that your sole duty is not to your profession; that you owe a prior and higher duty to the State, and to each and every subdivision thereof as "an effluence from the sovereignty of Kentucky." Love, reverence, and extol, but, above all, serve Kentucky, and, wherever you may be, and whatever you may do, and whatever destiny fate may have in store for you, carry with you the consciousness that you have sworn to be "faithful and true to the Commonwealth of Kentucky." Yet, at all times and in all circumstances, hold steadfast the conviction that this sacred pledge makes no demand of you to compromise the fact or to suppress the fact that *the State was made for man, not man for the State.* Bear always and everywhere in mind that there are innate and inestimable rights which the State can neither give nor take away, and that do not depend for their value or their validity upon any constitutional sanction whatever. By such means will the beneficent doctrine of political sovereignty be kept within its proper bounds and yet lose none of its essential power or saving efficacy.